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June 13, 1997

The Honorable William F. Caton
Acting Secretary
Federal Communication Commission
1919 M Street, N.W., Suite 222
Washington, D.C. 20554

RE: Petition for Reconsideration by Pacific FM, Inc.
Fifth Report and Order and Sixth Report and Order
MM Dkt. 87-268

Dear Sir:

Enclosed is the original and nine (9) copies of the Petition for Reconsideration filed on behalf of Pacific FM, Inc. Should you have any questions, please contact undersigned counsel.

Respectfully submitted,

John F. Garziglia

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact Upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	

TO: The Commission

Petition for Reconsideration
by
Pacific FM, Inc.

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June 13, 1997

SUMMARY

The Federal Communications Commission adopted the *Fifth Report and Order* and the *Sixth Report and Order* in the above-referenced proceeding to usher television broadcasting into the digital age. This daunting task included the completion of an enormous task, developing a Table of Allotments for the entire country.

In completing this task, however, the Commission failed in its overriding duty to the preservation of the public interest, convenience and necessity. The Commission, in adopting the DTV Table, overlooked the impact of its decision to reduce the amount of available spectrum for future DTV broadcasting stations.

However, the Commission did not overlook the increased revenues that the reclamation of the spectrum would provide. Nor did it overlook the preservation of a VHF-dominated service, where locally-owned, independent UHF channels, already disadvantaged by engineering and financial concerns, must now face the codification of these deficiencies.

The Commission, in adopting the *Fifth Report and Order* and *Sixth Report and Order*, and specifically the DTV Table of Allotments, forever tilted the balance of competitive television broadcasting in favor of the established, major-network affiliated VHF stations, and has forever relegated the UHF stations to the role of a second class citizen.

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I. INTRODUCTION

In the *Fifth Report and Order* and *Sixth Report and Order*[1] of the above-mentioned proceeding, the Federal Communications Commission ("FCC" or "Commission") adopted policies regarding the implementation of Advanced Television Systems, including its DTV Table of Allotments, that violate the Communications Act of 1934 and adversely affect the status of current and future television licensees.[2]

The Commission, in adopting these rules, violated the Communications Act of 1934 by improperly considering the potential revenue of the reclaimed spectrum from the television broadcasters. As shown below, the FCC included as a public interest, convenience, and necessity consideration the reclamation of spectrum that was once reserved for television service, in order to increase revenue gained through competitive bidding.

Furthermore, Petitioner seeks reconsideration due to the adverse affect that the implementation of the DTV Table of Allotments will have on its ability to continue to provide free, over-the-air broadcasting to its community. Specifically, through the adoption of the "Core Spectrum" plan, the FCC improperly

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[1] *In re* Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, *Fifth Report and Order*, MM Dkt. 87-268, FCC 97-116 (rel. Apr. 21, 1997) [hereinafter *Fifth R&O*]; *In re* Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, *Sixth Report and Order*, MM Dkt. 87-268, FCC 97-115 (rel. Apr. 21, 1997) [hereinafter *Sixth R&O*].

[2] By authorization of the Chief of the Office of Engineering and Technology, the Petitioner is filing a combined Petition for Reconsideration of *Fifth R&O* and the *Sixth R&O*. *In re* Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Order*, MM Dkt. 87-268, DA-97-1193 (rel. June 5, 1997).

"fixed" the service area and audience reach of television broadcasters. The effect of this implementation will be the solidification of the inequitable distribution of service between the VHF and UHF stations, detrimentally affecting the competitive ability of the UHF licensees, and will forever relegate UHF stations to second-class citizens on the broadcast spectrum.

Therefore, due to these factors, explained fully below, Petitioner seeks full reconsideration of both the *Fifth Report and Order* and the *Sixth Report and Order* so that any implementation of the Advanced Television Service will be done independent of statutorily-forbidden considerations, and will better consider the needs of all television licensees, rather than just a select group.

II. THE ASSIGNMENT OF DTV CHANNELS TO A "CORE SPECTRUM" IS BASED ON GOALS THAT VIOLATE THE COMMUNICATIONS ACT OF 1934.

A. Throughout The DTV Proceeding, The Stated Goal Of The Commission Has Been To Recover Spectrum For Other Services.

The goal of the Commission to recover the spectrum for other purposes is best articulated in the *Second Report and Order and Further Notice of Proposed Rule Making* in this proceeding.[3] In fact, even at this early point, before the Commission was

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[3] *In re* Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, *Second Report and Order/Further Notice of Proposed Rule Making*, MM Dkt. 87-268, 7 FCC Rcd. 3340 (1992) [hereinafter *Second R&O*].

authorized to auction spectrum for non-broadcast services,[4] the Commission valued the spectrum to be recovered in terms of "rents or fees for occupancy," all the while noting the potential value of the recovered spectrum.[5] This goal was affirmed in the *Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry*.[6]

In the *Sixth Further Notice of Proposed Rule Making*,[7] however, the Commission actually articulated for what the recovered spectrum could be used, specifically mentioning that the recovered spectrum "could be *licensed through competitive bidding* for flexible mobile operations..."[8] Further discussion of this issue continued in the *Sixth R&O*, disclosing the Commission's willingness to have the recovered spectrum be put up for auction, and that the new DTV Table was formed to "facilitate that early

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[4] The Federal Communications Commission received authorization to auction spectrum through the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, Title VI, Sec. 6002, 107 Stat. 312, 318 (Aug. 10, 1993).

[5] *Second R&O*, *supra* note 3, 7 FCC Rcd. 3354 n.158

[6] *In re* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry*, MM Dkt. 87-268, 10 FCC Rcd. 10540, para. 56 (1995) [hereinafter *Fourth FNPRM*].

[7] *In re* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Further Notice of Proposed Rule Making*, MM Dkt. 87-268, 11 FCC Rcd. 10968, para. 26 (1996) [hereinafter *Sixth FNPRM*].

[8] *Id.* para. 26 (emphasis added). In fact, this proposal was discussed at length in the *Report and Order* establishing the Wireless Communications Service. *In re* Amendment of the Commission's Rules to Establish Part 27, The Wireless Communications Service, *Report and Order*, 6 Comm. Reg. (P&F) 771, paras. 77, 78 (1997).

recovery of this portion of the spectrum."[9]

Clearly, then, the Commission has articulated its goal to recover spectrum for the purpose of auctioning this spectrum for other purposes. Indeed, as it will be show below, current broadcasters are being forced off of spectrum to facilitate this stated goal.

B. The Commission Allocated Spectrum That Would Otherwise Allow Television Operators To Maintain Or Expand Their Service To Be Re-Allocated For Auctioning Purposes.

As stated above, the FCC has been considering for nearly four years the potential uses of the spectrum it recovers from the transition to digital television. At the same time, it has had an equally difficult decision: how to recover the spectrum, on the one hand, and how to funnel television stations operating on 70 channels, into a "core" block of spectrum spanning only 44 to 49 channels, on the other.[10]

Specifically, the *Sixth R&O* eliminates channels 52-69 from future available allotments.[11] Instead, channels 2-51, or even 7-51, are left remaining to meet the needs of nearly 1600 full-service television licensees, over 1900 LPTV licensees, and almost 5000 TV Translators.[12] In its *Sixth R&O*, though, the Commission stated that 97 of the 1600 full-power licensees operate on channels 60-69 (6%), and that 93% of the allotments would provide

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9 *Sixth R&O*, *supra* note 1, paras. 79, 80 n.147.

10 *Id.* para. 76

11 *Id.* para. 87.

12 Broadcast Station Totals as of May 31, 1997, *FCC News*, rel. June 6, 1997.

at least 95% service area replication.[13] The stations that remain on Channels 60-69 during the transition stage, approximately 30 stations, will be allowed to move into the "core" region somewhere down the line, after the dust settles.

Thus, at this point, even before considering modifications to DTV stations, the inclusion of additional channels through modifications to the DTV Table of Allotments, or the relocation of almost 7000 FCC licensed facilities, the FCC failed to allot enough spectrum for the complete replication of existing stations. Instead, the Commission determined that it would allow these "non-eligible" licensees to relocate on unused DTV spectrum, so long as interference is not caused.[14] Further, it has determined that it would be in the public interest to counter future interference problems of the eligible broadcasters with directional antennas,[15] rather than provide enough spectrum for *all* free, over-the-air, television broadcasters. Thus, the Commission has reached the conclusion that the potential benefits of recovering the spectrum for auctioning is more important than the future impact on over 8600 licensed television stations.

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[13] *Sixth R&O, supra* note 1, para. 78

[14] *Id.* para 95, 147. The Commission divided the television licensees into "eligible" and "non-eligible" in the *Fifth R&O* in this rulemaking proceeding. *Fifth R&O, supra* note 1. Eligible licensees are those that "hold a license to operate a television broadcast station or a permit to construct such station, or both." *Id.* para. 17. Non-eligible licensees are all other television licensees, including Low Power Television stations, VHF TV Translators, and UHF TV Translators, along with those individuals with pending construction permit applications for new stations. *Id.*

[15] *Sixth R&O, supra* note 1, para. 78

C. The Auctioning Of Spectrum, As Proposed, Would Violate Section 309(J)(7)(A) Of The Communications Act.

Thus, it is clear that the goal of the Commission has been to recover spectrum, to the detriment of the free, over-the-air television broadcasters, in order to auction their spectrum. Indeed, in the *Sixth R&O*, the Commission found that:

> the public interest is best served by developing a Table of Allotments that meets the DTV spectrum needs of broadcasters during the transition; *facilitates the early recovery* of spectrum from channels 60 to 69; and *also facilitates the eventual recovery* of 138 MHz of spectrum currently being used for analog broadcasting.[16]

The only problem is that the Communications Act of 1934 forbids this consideration.

Section 309(j)(7)(A) of the Act forbids the Commission from considering the financial benefits of competitive bidding when determining the public interest, convenience and necessity.[17] However, in the previous decisions in this proceeding, and specifically in the *Sixth R&O*, the Commission considered just this factor when it looked to Senator McCain's proposal[18] and the establishment of the Wireless Communications Service in determining to recover channels 60-69. Rather, despite Section 309(j), it rationalized that the public interest would be served

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16 *Id.* para. 76 (emphasis added).

17 47 U.S.C. §§ 151, 309(j)(7)(A) (1994).

18 Senator McCain introduced a bill to set-aside a portion of the reclaimed spectrum to make it available to public safety services. All spectrum that is not claimed by these agencies would then be licensed through competitive bidding. The Law Enforcement and Public Safety Telecommunications Empowerment Act, S. 225, introduced Feb. 4, 1997. *See also Sixth R&O, supra* note 1, para. 79 n.147.

by the anticipated revenue from these auctions, rather than from the TV broadcasters continuing service to their local communities the only legitimate consideration under Section 307(b) of the Act.

Therefore, due to the expectation of revenues from the auctioning of this spectrum, along with the stated finding that the public interest would be served from reclaiming this spectrum from the television broadcasters, the Commission has directly violated the Communications Act of 1934, and it should reconsider the underlying decision to reclaim spectrum articulated in the *Sixth Report and Order*.

III. THE USE OF THE "CORE SPECTRUM" THREATENS THE FUTURE OF FREE, OVER-THE-AIR BROADCASTING SERVICE.

A. The Federal Communications Commission Cemented All Present Inequities In Television Broadcasting Through The Adoption Of The "Core Spectrum" Plan.

Currently, there is a great disparity between the service provided by the large, group or network-owned VHF stations, and the independent, locally-owned UHF stations in each market. For example, due to their late emergence, the UHF stations are restricted by spacing requirements to other stations which results in smaller audiences than that provided to the VHF stations.[19] Historically, the owner of a UHF station is typically a small business, or sole proprietorship with limited financial resources. As such, the independent UHF station reaches a much smaller population, and receives less advertising revenue than the VHF

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[19] 47 C.F.R. § 73.610 (1996).

stations.

With the introduction of DTV, though, these inequities were intended to be erased. The *Fourth FNPRM* announced that digital technology would allow multi-channel programming and subscription-based services that could potentially serve as new sources of revenue for television stations.[20] Thus, struggling UHF stations could have potentially used this new revenue for upgrading their stations to expand their audience reach.

However, under the "Core Spectrum" plan as adopted in the *Sixth R&O,* the Commission based its allotments on the level of current service, as of April 3, 1997.[21] As such, unless a station found available unused spectrum, and applied for a modification to the DTV Table of Allotments, it is relegated to providing the same level of service it did on April 3, 1997. Additionally, any modifications to the DTV Table will be considered against potential interference of existing stations.[22]

Further, all new entrants, and non-eligible licensees will be forced to apply only for unused DTV spectrum, with a showing that interference will not be caused. Especially noteworthy is the fact that all operating LPTV stations and TV Translators who had their spectrum assigned to full service broadcasters will be forced to locate unused spectrum and apply for assignment.

This process would not be as onerous if there was a reasonable supply of available spectrum. If, for example, the

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20 *Fourth FNPRM, supra* note 6, 10 FCC Rcd. 10540, paras 4, 9.

21 *Sixth R&O, supra* note 1, para 33.

22 *Id.* para. 222.

entire existing broadcast spectrum encompassing Channels 2-69 was available, there would be little problem allowing smaller UHF stations to expand their reach, and LPTV and TV Translators to find spectrum to call home.

However, under the "Core Spectrum" plan, the FCC was unable to guarantee that even the full-service stations would be able to retain their full audience reach, let alone guarantee that existing stations would be able to expand, or that LPTV or TV Translators would be able to find unused spectrum for relocation.

Accordingly, smaller UHF stations are forced to remain at the same level of service as currently being provided. Further, not all current FCC licensees are guaranteed a continued presence on the spectrum. In effect, the Federal Communications Commission, through its adoption of the "Core Spectrum" plan, guaranteed only one thing for these operators, that they will be forever considered second-class citizens in the world of free, over-the-air broadcasting.

B. The Federal Communications Commission Stifled Future Competition Through The Adoption Of The "Core Spectrum" Plan.

Not only has the Commission guaranteed that the UHF stations will be forever fixed to serving their current audience, without room for growth, but also that they are forever guaranteed to inequitably compete with the larger VHF stations for advertising revenue.

For example, Petitioner operates Station KOFY-TV, a UHF

station serving the city of San Francisco, CA, located in the San Francisco-Oakland-San Jose DMA. However, its Grade A signal contour barely reaches the San Jose, and its Grade B signal contour does not reach Sacramento. On the other hand, the Grade B signal contour of the CBS-owned and operated VHF station, Station KPIX-TV, completely covers San Jose, and also reaches Sacramento. It has secured an allotment on the DTV Table that will allow it reach twice as large of an area as does the DTV allotment for KOFY-TV.

Furthermore, Station KXTV(TV), the ABC affiliate located in the Sacramento-Stockton-Modesto DMA, completely covers both San Jose and San Francisco with its Grade B signal contour, and covers Oakland with its Grade A signal contour. Its allotment on the DTV Table will allow it to also reach twice the area of KOFY-TV, and it will compete for advertising revenue in both DMAs.

Therefore, due to is position as of April 3, 1997, Station KOFY-TV is forced to remain in competition with at least two stations that are capable to compete in two separate DMA for advertising revenue. It will have to compete against at least two stations that have the flexibility and opportunity to offer advertisers greater area and audience reach, and Station KOFY-TV will be kept to compete at an "arms length" with its competitors due to their current authorized facilities.

Station KOFY-TV, though, will be unable to increase its service in its own DMA, and to reach the Sacramento DMA, under the DTV Table due to the constrained "core spectrum" as adopted by the FCC in its DTV Table of Allotments. Furthermore, the only other

possibility that Station KOFY-TV has is to solicit a channel-swap with another existing license in the community.[23] This potential solution, however, is not practical. The ability for a locally-owned licensee to negotiate with a network owned and operated station to exchange channels would be difficult to say the least. Instead, without the flexibility of channels 52-69, KOFY-TV will be forced for all time to serve as a second-class television operator in the San Francisco-Sacramento-San Jose area, and will not be allowed to compete against the other television stations.

This is but one example of how the DTV Table of Allotments will forever lock the television station into an inferior position vis-a-vie its competitors. Now, rather than be constrained only by the financial considerations of running an independent television station, the Federal Communications Commission, by adopting the DTV Table of Allotments, will guarantee that KOFY-TV will never have the ability to compete.

IV. THE FEDERAL COMMUNICATIONS COMMISSION IS DESTINED TO REPEAT THE ERRORS MADE IN TELEVISION ALLOCATIONS.

A. The Impact Of The Intermixing Order

In the dawning age of television broadcasting, the FCC made the first of its decisions to forever relegate UHF channels to secondary status on the spectrum. Despite several proposals, including DuMont Laboratories, Inc., to use solely one type of TV spectrum, either all-VHF or all-UHF, in a community, the Federal

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[23] *See* 47 C.F.R. § 73.622(c) (revised by *Sixth R&O*).

Communications Commission, instead, determined that "the UHF will be fully utilized and that UHF stations will eventually compete on a favorable basis with stations in the VHF" band.[24] The FCC rejected evidence presented by DuMont that, due to signal propagation and limited power ratings, UHF stations would not be able to compete effectively with the VHF-band stations.

As a result of this decision, after the FCC lifted its "freeze" on television allocations, the VHF stations, armed with higher power, and consumer TV sets that already received their signal, the UHF stations needed to rely on Congress, rather than "American science", to provide it relief.[25]

However it took an intervention by Congress to guarantee that the UHF stations would compete effectively. In the *All Channel Receiver Act*, adopted in 1962, Congress required the Federal Communications Commission to regulate the equipment for television tuners to require that it would receive UHF and VHF stations.[26] Indeed, it took the FCC until 1971 to recognize the plight of the independent UHF station. In the adoption of the Secondary Affiliation Rule,[27] the Commission noted several

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[24] *In re* Television Assignments, *Sixth Report and Order*, 41 FCC 149, para. 197 (1952).

[25] *Id.* para. 199. In rejecting the argument that "equipment for employing the higher power in the UHF band is not available," the Commission based its hope on the fact that "there is no reason to believe that American science will not produce the equipment necessary for the fullest development of the UHF." *Id.*

[26] The All Channel Receiver Act of 1962, Pub. L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. 303(s)) (implemented by the Commission in *The All Channel Receiver Rules, First Report and Order*, Dkt. 14760, 27 Fed. Reg. 11698 (1962)

[27] *In re* Amendment of Section 73.658 of the Commission's Rules

deficiencies of UHF service: (1) the difference between VHF and UHF reception capability; (2) the difference in tuning convenience; (3) the difference in the area serviced; (4) a shorter period of service to the public; (5) lower quality programming; and (6) questionable programming service due to the short-notice of over-flow programs.[28]

Subsequent to this action, the FCC utilized the authority given it by the *All Channel Receiver Act* to require manufacturers to include UHF antennas, and lessening the maximum noise figure for television receivers, and promoting community awareness of UHF reception improvements.[29]

Thus, it took the Commission over 30 years to promote the position of UHF to a level even somewhat competitive to VHF. By adopting the *Sixth Report and Order* in 1952, the Commission's policy of intermixing UHF and VHF stations affected the UHF's capability to compete, and only with subsequent congressional and FCC intervention, did the two services even remotely become a viable option.

B. The DTV Table's Codification Of Disparate Treatment

By adopting the DTV Table of Allotments, the FCC is repeating the same errors of their predecessors, and are

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to Limit Television Stations' Access to the Programs of more than one National Network, *First Report and Order*, 28 FCC 2d 169 (1971).

[28] *Id.* para. 46.

[29] *In re* Review of the Commission's Regulations Governing Television Broadcasting, *Report and Order*, 10 FCC Rcd. 4538, para. 20 (1995) (citations omitted).

codifying the disparate status of the two services.

The DTV Table of Allotments, as demonstrated above, does not allow for the modification of facilities, due to the increased density of the spectrum. This density is caused by the desire/need to auction the spectrum to increase revenues for the Federal Government, which resulted in the adoption of the "Core Spectrum" plan.

This disparate treatment, as adopted by the DTV Table, also raises the concern that the two services are not fairly allocated, and thus in violation of Section 307(b) of the Act. Section 307(b) provides that the Commission shall be responsible for making "fair, efficient, and equitable distribution[s]" of the spectrum when distributing licenses and authorizing power to the licensees.[30] However, the DTV Table unfairly, and inequitably, distributes licenses and power, for the sake of efficient auctioning. For example, UHF stations are allocated their DTV spectrum with maximum power levels. The only method to increase its power, and thus its audience reach, is to ask for a waiver of this maximum power, so long as interference is not caused. However, due to the adoption of the "Core Spectrum" plan, it appears to be very difficult, if not impossible, to find available spectrum in the community for the expansion of the licensee's service.

Thus, by the adoption of the "Core Spectrum" plan, the FCC has limited the flexibility and availability for future

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[30] 47 U.S.C. § 307(b) (1994).

modifications to the licenses. In addition, it has fixed UHF stations to operate at significantly lower power than VHF station. However, Section 307(b) mandates that the FCC distribute licenses fairly, equitably, and efficiently. As such, while, the "Core Spectrum" plan was adopted to serve the need for efficient reclamation of the spectrum for other uses, it has done so to the detriment to its other two charges, fairness and equity. Therefore, the Commission has violated Section 307(b) of the Act, in addition to Section 309(j)(7), through the adoption of the DTV Table, and must reconsider its actions.

C. The DTV Table Of Allocations Will Have The Same Effect As The Intermixing Order Of 1952

The adoption of the Intermixing Order in 1952 had the effect of stifling the competition of UHF between VHF stations for more than 30 years. The reasons, as discussed above, center mainly around the FCC's failure to protect UHF licensees from the impact of the inherent differences between the two systems.

By adopting the DTV Table, the FCC is repeating the same mistake. Most striking is the maximum power level imposed by the *Sixth R&O*. While operating under the NTSC system, a UHF station, that could afford the exorbitant power bill incurred when operating at 5 mW, could modify its facilities, and receive protection. However, under the rules adopted by the *Sixth R&O*, the maximum a UHF station could ever operate at is 1000 kW. To exceed this maximum power rating, the licensee would have to petition the FCC for a waiver of the rules. However, by

utilizing limited spectrum, along with limiting the maximum power that a station can operate at, the FCC has effectively stifled the growth of the UHF band into its rightful role as an equal partner in television broadcasting. This is but another way that the Federal Communications Commission, in adopting the DTV Table of Allotments and accompanying rules, have decidedly, and permanently, tilted the scales against the local, independent television operator, in favor of the large, network-owned and operated VHF stations.

V. CONCLUSION

Thus, on the basis of these considerations, the Petitioner seeks reconsideration of the *Fifth Report and Order* and *Sixth Report and Order* so that the Commission can fully examine both the violations of the Communications Act of 1934, and the inequitable impact that these rules would have on the majority of television licensees.

Respectfully submitted,

Pacific FM, Inc.

By: 
Its Attorney
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June 13, 1997

CERTIFICATE OF SERVICE

I, Lisa A. Skoritoski, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 13th day of June, 1997, copies of the foregoing Petition for Reconsideration were mailed, postage prepaid, to the following:

Honorable Reed E. Hundt *
Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

Honorable James H. Quello *
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 814
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Honorable Rachelle B. Chong *
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Lisa A. Skoritoski

*Via Hand Delivery